COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Complaint of WorldCom Technologies, Inc. (successor-in-interest to MFS Intelenet Service of Massachusetts, Inc.) against New England Telephone and Telegraph Company d/b/a Bell Atlantic – Massachusetts for alleged breach of interconnection terms entered into under Sections 251 and 252 of the Telecommunications Act of 1996	D.T.E. 97-116
Complaint of Global NAPs, Inc. against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for declaratory relief with respect to reciprocal compensation.	D.T.E 99-39

RESPONSE OF XO MASSACHUSETTS, INC.

TO VERIZON MOTION TO RE-OPEN

I. INTRODUCTION

Pursuant to the Hearing Officer's Memorandum dated July 26, 2002, XO Massachusetts, Inc. ("XO") files these comments in response to the Motion of Verizon Massachusetts to Re-Open Dockets in D.T.E. 97-116 and D.T.E. 99-39.[1] XO strongly urges the Department to follow the approach it has used more than once in this proceeding – namely, to wait for a decision by the authority to which the Department must defer. *MCI WorldCom,* D.T.E. 97-116-E, p. 11; D.T.E. 97-116-D, p. 14. At this point, that authority is the United States District Court and its decision should be issued without significant delay because the Magistrate Judge has already rendered a detailed

[1] XO was not a party to this proceeding in its earlier iterations, but since that time has become active in the Massachusetts telecommunications market and has opted-into the MCI-Metro Interconnection Agreement. XO is materially affected by this proceeding, as discussed in its Motion to Intervene filed simultaneously herewith.

and well-reasoned Recommendation and Findings. For that reason, the Department should deny Verizon's Motion. This approach is more consistent with the accepted framework of an appeal, where the Department's action, if any after appeal, is on remand in response to directions of the court. Not only would denial of Verizon's Motion avoid potentially thorny jurisdictional issues, it would conserve resources of the Department and the parties by avoiding a potentially unnecessary, or misdirected reopened proceeding. Finally, Verizon has not met the threshold requirement of "good cause" under the Department's own regulations. 220 CMR 1.11(8).

II. THE DEPARTMENT SHOULD DENY VERIZON'S MOTION

A. Administrative Efficiency Requires that the Department Await Decision by the Federal District Court

Throughout this proceeding, the Department has recognized that it must defer to determinations of Federal Law. Specifically, the Department first effectively stayed the effect of its original October 1998 ruling in D.T.E 98-116, by its order D.T.E 98-116-B, then reversed that original order by its order D.T.E. 98-116-C, then refused to reconsider that reversal. In each case the Department either expressly deferred to existing rulings of the Federal Communications Commission ("FCC") or noted that further FCC rulings were forthcoming, so no action by the Department to require reciprocal compensation payments by Verizon was appropriate. Similarly, at this juncture, the Federal District Court will be taking action upon the Magistrate Judge's Recommendation and Findings in the near future. Verizon has already taken exception to that Recommendation and Findings (as has the Department).

Should the Court itself accept those arguments in whole or in part, reopening by the Department of the proceeding now could be a total waste of time and resources and

could even delay a final resolution sorely needed for this critical issue. Even if the Court does not accept those arguments, it may not require a remand at all, or it may require the Department to take action on remand that differs from that suggested by the Magistrate Judge. In any of those scenarios, reopening the proceeding now may well serve no purpose and could just be an additional burden on the resources of all interested parties and the Department, especially in light of the not so limited nature of the reopened proceeding.

Until the District Court takes action upon the Magistrate Judge's recommendations, reopening the proceeding would not be productive or efficient. The only benefit that conceivably results from the Department reopening the proceedings now is a small savings of time if the District Court were ultimately going to rule exactly in accordance with the Magistrate Judge. However, that potential time savings is clearly outweighed by the disadvantages and costs noted above. Further, getting that ruling earlier provides no benefits to the Department or to Verizon, despite Verizon's laments to the contrary. Verizon does not have to make reciprocal compensation payments for internet bound traffic at this point, so it does not suffer any adverse financial consequences from the Department simply waiting for decision by the Federal District Court itself. Nor does Verizon suffer any increased market perception of risk from following XO's suggested course of action. This issue has existed on reciprocal compensation for several years and will likely not be resolved until further appellate review. Certainly, DTE interim action before a ruling of the Federal District Court will not reduce whatever risk level exists. Thus, savings of even a couple months in that

context is just not significant. Verizon provides no additional reasons supporting the reopening.

B. Re-opening Would Improperly Usurp Jurisdiction of the Federal District Court

Additionally, it is by no means clear that the Department can even legally re-open the proceeding at this time[2]. Certainly, the normal course of appellate review is that once appealed, the jurisdiction over a given case is in the appellate body. The cases cited by Verizon that allow continued agency action during the course of appellate review differ significantly from this case. The cited cases involve a federal agency acting under a different statutory scheme, which factor appeared to be important in those decisions. *E.g., American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 540, 541 (1970). Also, the matter being reviewed in those cases was comparatively simple: issuance of a single carrier permit. In contrast, the case at hand requires decisions that weigh competing interests of incumbent and competitive carriers, consider the nature of the competitive telecommunications market including the complex issue of inter-carrier compensation, and which easily involve disputes over tens of millions of dollars. Indeed, the issue in this case has been the subject of contention of numerous jurisdictions for several years. To suggest that some quick fix, additional finding by the Department with minimal input from the parties, can fully address any questions or issues that may arise is simply unrealistic.

Perhaps the most important reason interim agency action was allowable in the cases cited by Verizon, but should not be here, is that here the parties do not agree on the

[2] Indeed, Verizon even seems to admit that it is seeking to have the Department take an action for the purpose of short-circuiting the Federal District Court process -- even taking away the need for any District

propriety of such interim agency action pending decision by the Federal District Court. *Contrast, United States v. Benmar Transp. & Leasing Corp.* 444 U.S. 4, 6 (1979). That disagreement and the potential adversarial activity attending re-opening the proceedings should be reason enough for the Department to await action by the Federal District Court itself.

Nor does the additional case cited by Verizon, *Southwestern Bell Tel. v. FCC,* 10 F.3d 892 (1993), support reopening of the case at hand. The difference between *Southwestern Bell* and this case is that the FCC requested the remand immediately after the petitioners filed their briefs which provided additional legal argument that had not been made before the FCC. Here Verizon requests the remand after the Magistrate Judges R&F was issued. The FCC almost treated its requested remand as a motion for reconsideration. Here the DTE has rejected motions for reconsideration filed by CLECs. Verizon should not be permitted to litigate, determine it might lose and then request the DTE to intercede. WorldCom and Global NAPs selected their forum, they should be able to be able to have the District Court rule on their appeal.

Finally, it is not clear that the Department's standard for reopening a proceeding is met. *See* 220 CMR 1.11(8). That standard requires showing of good cause. Verizon fails even to address this standard, and its only assertions of reasons to re-open are insufficient to support re-opening. One asserted reason is that the controversy is long-standing. As noted above, re-opening will in no way end the controversy. Verizon's other reason, uncertainty resulting from the Magistrate Judge's ruling, is no more sufficient. That ruling may influence the ultimate ruling of the Court, but the Court must

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Court decision. (See Verizon Motion p. 3). Such an effort to have Department action trump Federal District court jurisdiction is simply not proper.

rule, so any uncertainty is not significant. Further, the Magistrate Judge's Recommendations and Findings may be superceded by the decision of the District Court itself. Thus, Verizon has shown no good reason for reopening this proceeding.[3]

III. SHOULD THE DEPARTMENT REOPEN THE PROCEEDINGS NOW, VERIZON'S SUGGESTED MINIMAL PROCESS IS INSUFFICIENT

If, despite the reasons set forth herein and as may be urged by other CLEC parties, the Department finds it appropriate to reopen the proceedings, the Department should allow interested parties full due process rights. In contrast to the barebones process suggested by Verizon of interested parties being able to file initial and reply comments within a few weeks of reopening, XO believes that it is necessary to consider more than just legal argument. XO does not suggest that the process be dragged out to any significant length at all. However, given the difficulties that decisionmakers have had previously with determining the meaning of contract language in interconnection agreements as to reciprocal compensation, it seems necessary to consider corollary facts such as accepted industry practices or contemporaneous course of dealing. Development of a record on such matters could be useful and would not have to involve any significant elongation of the process. For example, where the evidence to be taken would be within a narrow range, filings of testimony or other documents that develop such facts could be subject to abbreviated discovery and cross of all witnesses at the same time. That sort of procedure would ensure that no party could reasonably claim that it was deprived of its due process rights, but the reopened proceeding could still be done within a period of

[3] Nor is the Magistrate Judge's Recommendations and Findings a change in applicable law because a decision by the Federal District Court itself will issue shortly and that will constitute the applicable law then.

about 6 weeks. [4] With an allowance for such time to develop the record, the time for "comments" (briefs) could be slightly reduced and the entire process could be completed in about 10 weeks, compared to the 4 weeks allowed under Verizon's process.

CONCLUSION

For all the reasons set forth herein the Department should deny Verizon's Motion to Reopen. However, should the Department grant such Motion, it must allow the parties some reasonable opportunity to develop a factual record upon which a decision about the meaning of the applicable contract(s) may be made.

Respectfully submitted,

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[4] Indeed, the alternative of waiting for the Federal District Court to review, with the reasonably likely result of its decision being similar to that of the Magistrate Judge, would involve a remand, where the Department would have to give parties at least the level of process and opportunity to present evidence and argument as suggested herein.